

UNITED STATES OF AMERICA
POSTAL RATE COMMISSION
WASHINGTON, DC 20268-0001

Postal Rate and Fee Changes

Docket No. R2005-1

PRESIDING OFFICER'S RULING DENYING THE
OFFICE OF THE CONSUMER ADVOCATE MOTION
TO COMPEL RESPONSES TO INTERROGATORIES
OCA/USPS-196-207

(Issued September 21, 2005)

On September 9, 2005, the Office of the Consumer Advocate (OCA) filed a Motion to Compel responses to interrogatories OCA/USPS-196-207.¹ The Postal Service filed its response to the Motion to Compel on September 16, 2005.² For the reasons set forth below, the Motion to Compel is denied.

These interrogatories seek information related to the potential impact of the proposed Postal Reform legislation on Docket No. R2005-1. OCA asserts that the information requests are proper because they seek admissible evidence that "will in all probability guide the course of the Commission's and the Postal Service's procedures in this case."³ The interrogatories seek information regarding hypothetical questions on legislation that is working its way through the legislative process that may or may not ultimately become law. According to OCA, this proposed legislation would eliminate the

¹ Office of the Consumer Advocate Motion to Compel Responses to Interrogatories OCA/USPS-196-207, September 9, 2005 (Motion to Compel).

² Response of the United States Postal Service to the Office of the Consumer Advocate's Motion to Compel Responses to Interrogatories OCA/USPS-196-207, September 16, 2005 (Response); *see also* Objection of the United States Postal Service to Interrogatories of the Office of the Consumer Advocate (OCA/USPS-196-207), August 29, 2005 (Objection).

³ Motion to Compel at 2.

escrow payment that the Postal Service offered as the sole basis for filing Docket No. R2005-1. It would instead require the Postal Service to make a “sizeable” payment into a Retiree Health Benefits Fund.⁴ OCA is concerned that if this legislation passes, “[s]ince the \$3.1 billion escrow payment was viewed by the Postal Service as an institutional cost, while a retiree health benefit payment is mostly attributable, the rates proposed by the Postal Service might very well be in violation of §3622(b)(3) in that some classes of mail might not even be covering their attributable costs.”⁵ Given these potential changes, if this legislation passes before the Commission issues its opinion, OCA believes that the current record will not be adequate for the Commission to render its opinion and recommended decision since the record does not include information on retiree health benefit funds required to be paid or the impact of attributing those potential payments to the various mail classes. OCA further asserts that these issues “would not have been possible” until this postal reform legislation recently came to the top of Congress’s agenda, and accordingly, it could not have brought these issues to light in this case sooner.⁶ Finally, OCA asserts that these interrogatories filed on August 19, 2005, are timely since the last day for discovery was set to be August 23, 2005 by P.O. Ruling R2005-1/11, not June 10 and June 17 as the Postal Service erroneously claims.

The Postal Service claims that these interrogatories are untimely and do not seek information for developing rebuttal testimony and, accordingly, the Motion to Compel should be denied. The Postal Service contends that the interrogatories seek speculative answers based on a series of hypotheticals.⁷ For purposes of this docket, the Postal Service believes that the best course of action relating to this legislation is that “[u]nless and until actual legislation is passed and analyzed, it is premature and

⁴ *Id.* at 3.

⁵ *Id.* at 4.

⁶ *Id.* at 9.

⁷ Response at 2 (“The interrogatories seek speculative answers based on a series of hypotheticals: if Congress passes legislation, and if the legislation contains additional costs, and if the Postal Service takes the position that the case should not be withdrawn, contrary to what it has heretofore stated.”).

impossible to speculate accurately on its effect on the request in this docket.”⁸

Accordingly, the Postal Service contends that should these or other hypotheticals become reality, it will decide the next steps to take in this case and promptly inform the Commission and participants of that determination.

Discussion. OCA argues that the date for “completion of discovery directed to the Service is clearly indicated as August 23.”⁹ Although Attachment A to the Ruling lists this item on its chronological calendar, the body of the Ruling clarifies that this later date is for “[d]iscovery requests to the Postal Service solely for the purpose of preparing testimony in rebuttal to the evidence....”¹⁰ The Ruling directs that June 10, 2005 and June 17, 2005 are to be the last days to submit discovery on the Postal Service’s direct case. It would circumvent the spirit of that Ruling to end discovery on the direct case of Postal Service’s identified witnesses on June 17, 2005, but allow participants to propound interrogatories to the Postal Service, as an institution, until August 23, 2005.¹¹ Accordingly, OCA’s interrogatories at issue here are untimely.

However, as OCA correctly points out, Rule 25(a) is not an absolute bar to discovery requests submitted after the discovery deadline has passed.¹² It does not state that the “only” exception to an applicable discovery deadline is to develop rebuttal testimony, as the Postal Service argues. Instead, Rule 25(a) uses terms like “generally,” and “an exception,” which shows that other exceptions to the general rule may exist.¹³ Accordingly, Rule 25(a) is not an absolute bar to discovery requests submitted after the discovery deadline has passed.

⁸ *Ibid.*

⁹ Motion to Compel at 8 (quoting P.O. Ruling R2005-1/11, Attachment A at 1).

¹⁰ P.O. Ruling R2005-1/11 at 3.

¹¹ Because a participant could propound the same interrogatory to either an identified witness or the Postal Service as an institution, having vastly different discovery deadlines for identified witnesses and the institutional entity would render the first deadline meaningless.

¹² 39 CFR §3001.25(a).

¹³ *Id.* (emphasis added). If this rule was the “only” exception, it would have most likely used more limiting terms such as “the exception,” or “the only exception.”

Given the possible existence of other exceptions to the general rule of Commission Rule 25(a), OCA argues that an exception should exist here for its interrogatories because they “would not have been possible” to ask in earlier stages of the proceeding. Interrogatories that would not have been possible to ask in earlier stages of the case may in certain circumstances provide an exception to the general discovery deadline in Rule 25(a). However, OCA could have asked these questions earlier in this case, and it does not articulate a persuasive reason why it could not have done so. The proposed legislation at the heart of its questions has been pending in the House of Representatives since January 4, 2005 (H.R. 22) and the Senate since March 17, 2005 (S. 662). Before becoming law, the legislation still needs to pass several more hurdles. Along the way it may be amended, which will result in different circumstances than those posited in the questions raised by the interrogatories. Adequate preparation for possible outcomes and contingencies would overburden the participants and the Commission. Accordingly, action by committees and one house of Congress does not, without more, make pending legislation important enough to justify an exception to discovery deadlines. Generally, the Commission and participants must act in accordance with the law as it is currently written, not speculate upon possible Congressional intervention into that process.

In the event that any proposed legislation that affects this proceeding becomes law and the record in this proceeding is not adequate for the Commission to render its opinion and recommended decision, participants, including OCA, will be allowed appropriate procedural due process.¹⁴ Depending on the nature of any legislation that Congress may enact, this could include allowing supplemental discovery and briefing

¹⁴ OCA cites Order No. 371, March 31, 1981, in support of its position that the current pending legislation should be discoverable at this juncture of the case. Order No. 371 was issued in response to the Governors’ Decision on Docket No. R80-1 sending the case back to the Commission for reconsideration. The original Commission record included revenue forecasts that incorporated full Congressional appropriations. When the case was sent back to the Commission for reconsideration, however, circumstances indicated that Congress might reduce appropriations relied upon in that rate case. Order No. 371 was issued at the early stages of the reconsideration of R80-1. Here, the advanced stage of this case differentiates the current situation from that at issue in R80-1. Accordingly, Order No. 371 is not applicable here.

opportunities or reopening the record. Allowing OCA to ask questions about pending legislation now will not save significant time and Commission resources later if Congress enacts new legislation. Accordingly, these interrogatories are not the type of questions that warrant exception to the general discovery rules at this time. The Motion to Compel is denied.

RULING

The Office of the Consumer Advocate Motion to Compel Responses to Interrogatories OCA/USPS-196-207 filed on September 9, 2005, is denied.

George Omas
Presiding Officer